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Planned and possible future work — Part I

Note by the Secretariat

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I. Introduction

A. Background

1. At its forty-sixth session, in 2013, the Commission agreed that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session (A/68/17, para. 310).[1]

2. This Note has been prepared to enable the Commission's consideration of future work at this forty-seventh session. It considers all UNCITRAL's main activities, both legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (see para. 7 below for references to documents that explain the activities concerned). This Note also covers mandated and possible future subject-areas.

3. When setting UNCITRAL's work programme for the forthcoming period, the Commission may wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five year period) may also be appropriate (A/68/17, para. 305).

4. The Commission may wish to have reference to the following documents, to which this Note also refers:

Background documents from Commission's forty-sixth session, available at www.uncitral.org/uncitral/commission/sessions/46th.html, and including:

A/CN.9/774 — Planned and possible future work, Note by the Secretariat; and

A/68/17 — Report of the Commission's forty-sixth session (notably, paras. 292- 332).

Background documents from the Commission's forty-fifth session, available at www.uncitral.org/uncitral/commission/sessions/45th.html, and including:

A/CN.9/752 and Add.1 — A strategic direction for UNCITRAL, Note by the Secretariat;

A/67/17 — Report of the Commission's forty-fifth session (notably, paras. 228-232).

Documents for the current Commission session, available at www.uncitral.org/uncitral/commission/sessions/47th.html, and including:

A/CN.9/800 — Report of Working Group I (MSMEs) on the work of its twenty-second session (New York, 10-14 February 2014);

[1] The Commission may wish to recall that at its forty-fourth session, in 2011, it requested the Secretariat to prepare a note on strategic planning, with possible options and an assessment of their financial implications (Report of the Commission's Forty-fourth Session, Supplement No. 17 (A/66/17), para. 343). At its forty-fifth session, in 2012, the Commission considered the resulting note by the Secretariat ("A strategic direction for UNCITRAL", A/CN.9/752 and Add.1) submitted pursuant to that request, and agreed to consider and provide further guidance on UNCITRAL's strategic direction at its forty-sixth session, requesting the Secretariat to reserve sufficient time to allow for a detailed discussion at that time (A/67/17, para. 231).

A/CN.9/794 — Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-ninth session;

A/CN.9/795 and A/CN.9/801 — Reports of Working Group III (Online Dispute Resolution) on the work of its twenty-eighth and twenty-ninth session;

A/CN.9/797 and A/CN.9/804 — Reports of Working Group IV (Electronic Commerce) on the work of its forty-eighth and forth-ninth sessions;

A/CN.9/798 and A/CN.9/803 — Reports of Working Group V (Insolvency Law) on the work of its forty-fourth and forty-fifth sessions;

A/CN.9/796 and A/CN.9/802 — Reports of Working Group VI (Security Interests) on the work of its twenty-fourth and twenty-fifth sessions;

A/CN.9/773 — Status of the conventions and model laws, Note by the Secretariat;

A/CN.9/818 — Technical assistance activities undertaken since the Commission's forty-fifth session and technical assistance resources, Note by the Secretariat, including UNCITRAL publications, the UNCITRAL website, and a survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) since the Commission's forty-fifth session;

A/CN.9/809 — Brief survey of the activities undertaken by the Secretariat since the Commission's forty-fifth session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat;

A/CN.9/810 — Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests);

A/CN.9/811 — Note by the Secretariat on security interests in non-intermediated securities);

A/CN.9/815 — Report of the UNCITRAL International Insolvency Law Colloquium (Vienna, 16-18 December 2013);

A/CN.9/819 — Possible future work in Public-Private Partnerships (PPPs) Discussion paper — Part I;

A/CN.9/820 — Possible future work in Public-Private Partnerships (PPPs) Discussion paper — Part II;

A/CN.9/821 — Report of an International Colloquium on Public-Private Partnerships (Vienna, 3-4 March 2014).

II. Summary of current activities

A. Legislative work

5. The table below sets out current legislative development, and the envisaged completion dates of the texts concerned.

Table 1
Current legislative activities (Section III.A below considers future legislative activities)

Topic	*Report and document references*	*Envisaged completion date*
Arbitration (WG II)		
Draft convention on transparency in treaty-based investor-State arbitration	A/CN.9/812	2014
Online dispute resolution (WG III)		
Preparation of a legal standard on online dispute resolution for cross-border electronic transactions	A/CN.9/795 and A/CN.9/801	Estimated 2015 or beyond
Electronic commerce (WG IV)		
Electronic transferable records	A/CN.9/797 and A/CN.9/804	Estimated 2015 or beyond
Insolvency (WG V)		
(i) Model law or legislative provisions on selected international issues, including jurisdiction, access and recognition in the cross-border insolvency of enterprise groups	A/CN.9/691 A/65/17[2] A/CN.9/798 A/CN.9/803 A/CN.9/815	Estimated 2016 or beyond
(ii) Obligations of directors of enterprise groups members in the period approaching insolvency	A/CN.9/691 A/65/17[3]	Estimated 2015 or beyond
(iii)Study on the insolvency of large and complex financial institutions	A/CN.9/691 A/65/17[4] A/CN.9/798	Ongoing
MSMEs		
Preparation of legal standards on simplified business incorporation and registration	A/CN.9/800	Estimated 2015 or beyond
Security interests (WG VI)		
Preparation of a draft Model Law on Secured Transactions	A/CN.9/796 and A/CN.9/802	2015

6. As the table indicates, a draft convention on transparency in treaty-based investor-State arbitration, prepared by Working Group II, will be presented for consideration at this Commission session.

B. Other activities

7. The reports available to the forty-seventh session of the Commission describing UNCITRAL's current activities in the provision of technical assistance, promoting ways to ensure a uniform interpretation and application of UNCITRAL texts; identifying the status of and work of other bodies in promoting its texts, coordination and cooperation with other relevant bodies and promoting the rule of law at the national and international levels are as follows:

[2] A/65/17, para. 259 (a).
[3] A/65/17, para. 260.
[4] A/65/17, para. 260.

A/CN.9/805 — Bibliography of recent writings related to UNCITRAL's work;

A/CN.9/818 — Technical assistance to law reform and technical assistance resources, including UNCITRAL publications, the UNCITRAL website and UNCITRAL regional presence: survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP);

A/CN.9/806 — Status and promotion of UNCITRAL legal texts (status of the conventions and model laws resulting from UNCITRAL's work as well as the status of the New York Convention);

A/CN.9/809 — Coordination and cooperation: (i) Brief survey of the activities undertaken by the Secretariat; (ii) Reports of other international organizations;

A/CN.9/810 — Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: (i) Case Law on UNCITRAL texts (CLOUT), (ii) Digests of case law relating to UNCITRAL legal texts;

Oral report — Role of UNCITRAL in promoting the rule of law at the national and international levels.

III. Summary of mandated and possible activities after July 2014

A. Legislative work

1. Mandated future work

8. The phrase "mandated future work" refers to planned legislative development, i.e. work that the Commission has remitted to a working group.

9. The Commission has mandated future work to Working Group II as regards the UNCITRAL Notes on Organizing Arbitral Proceedings (1996).[5] At its forty-sixth session, in 2013, the Commission considered that the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[6] required updating as a matter of priority. It was agreed that the preferred forum for that work would be that of a working group, to ensure that the universal acceptability of those Notes would be preserved (A/68/17, para. 130). At its sixtieth session, the Working Group reiterated its understanding that it would commence work on the revision of the Notes on Organizing Arbitral Proceedings at its sixty-first session (A/CN.9/799, para. 147).

2. Possible future work

10. The phrase "possible future work" refers to legislative development proposed to the Commission, but in respect of which it has not yet provided a mandate to a working group.

[5] UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.
[6] UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.

11. The Commission has before it proposals for possible future work on the subject areas set out in Table 2 below. The final column of the table identifies areas in which a proposal may involve issues of another subject-area.

Table 2
Summary of possible future legislative activity

Subject area	*Proposal*	*Document reference*	*Other relevant subject areas*
Arbitration	Concurrent proceedings in the field of investment arbitration	Para. 13 (a) below Addendum to this Note	–
Electronic commerce	Identity management, mobile payments and electronic single windows	Para. 13 (b) below	MSMEs (mobile payments)
Insolvency	(i) Insolvency of MSMEs	Para. 13 (c) below	
	(ii) Enforcement of insolvency-derived judgements	Para. 13 (c) below	
	(iii) Convention on selected international insolvency issues	Para. 13 (c) below A/CN.9/691 A/65/17[7] A/CN.9/815	
International contract law	Broad proposal on international contract law	Para. 13 (d) below	–
MSMEs	Development of legal standards on dispute resolution, access to financial services, access to credit, and insolvency	Para. 13 (d) below A/68/17, paras. 316-321	Arbitration and conciliation, Insolvency, Security Interests
Online Dispute Resolution	Preparation of guidelines for ODR providers and platforms	Para. 13 (e) below A/CN.9/WG.III/WP.128	
PPPs	Development of a Model Law and supporting Guide to Enactment	Para. 13 (f) below A/CN.9/819, A/CN.9/820, A/CN.9/821	Arbitration/ conciliation, MSMEs, Insolvency, Security Interests
Security interests	Guide to Enactment of the Model Law on Secured Transactions Contractual Guide on Secured Transactions – Uniform law text on intellectual property licensing	Para. 13 (g) below	

12. Further proposals may be made to the Commission at its current session, recommending legislative mandates for other subject-areas.

13. Details of the proposals outlined in Table 2 are found in the following paragraphs, and the documents referred to therein.

[7] A/65/17, para. 259 (a).

(a) *Arbitration*: The Commission may wish to recall that, at its forty-sixth session, in 2013, it considered work that could be recommended in the field of international arbitration. In that context, it was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature. The Commission was informed that the International Arbitration Institute (IAI, Paris), the Geneva Centre for International Dispute Settlement (CIDS) and the Secretariat jointly organized a conference on that topic on 22 November 2013, and that the Secretariat would report to the Commission on issues identified at that conference. The Addendum to document A/CN.9/816 provides further details on the proposals in this subject-area.

(b) *Electronic commerce*: The Commission agreed at its forty-sixth session to assess at a future time whether legislative development in electronic commerce would extend to identity management, single windows and mobile commerce (A/68/17, para. 313). Work continues through informal working methods on electronic single windows. Working Group IV may make recommendations regarding work on identity management at its 49th session. The report of that Working Group session will be issued after the date of this document (document A/CN.9/804).

(c) *Insolvency*: At its forty-sixth session, in 2013, the Commission decided that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to consider, inter alia, topics for possible future work, including insolvency issues specific to MSMEs. The conclusions of that colloquium would not be determinative but should be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.

The UNCITRAL International Insolvency Law Colloquium was held on 16-18 December 2013 in Vienna as part of the forty-fourth session of the Working Group (Vienna, 16-20 December 2013). Further background materials and presentations made at the colloquium are available at the following page on the UNCITRAL website: www.uncitral.org/uncitral/en/commission/colloquia/insolvency-2013.html. The report of the colloquium is before the Commission (A/CN.9/815).

The issues discussed at the colloquium were considered and evaluated by the Working Group at the end of its forty-fourth session and it was agreed that there remained significant areas for possible future work in the field of insolvency law. Having considered the priority in which work on the topics discussed might be undertaken, the Working Group was strongly of the view that at an appropriate time it should seek a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements. The Working Group was also of the view that choice of law issues relating to insolvency, review of the

chapter of the UNCITRAL Legislative Guide on Insolvency Law dealing with the insolvency treatment of financial contracts and netting, and the treatment of intellectual property contracts in cross-border insolvency cases were important issues that warranted consideration, and should be retained in that order as candidates for possible future work (A/CN.9/798, para. 30).

At its forty-fifth session, in response to the request from the Commission for Working Group V to provide advice as to whether the UNCITRAL Legislative Guide on Insolvency Law provided sufficient and adequate solutions for the insolvency of MSMEs, the Working Group agreed that the issues facing MSMEs were not entirely novel and that solutions for them should be developed in light of the key insolvency principles and the guidance already provided by the Legislative Guide. As to the form that work might take, the Working Group agreed that, while such work might form an additional part to the Legislative Guide, no firm conclusion on that point could be taken in advance of undertaking a thorough analysis of the issues at stake. The Working Group further agreed that it would not be necessary to wait for the results of the work being done by Working Group I in order to commence the study of insolvency regimes for MSMEs (A/CN.9/803, para. 14).

With respect to the other topics noted as possible priorities for future work, the Working Group:

(i) Recommended that it be granted a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements (A/CN.9/803, para. 41). It is envisaged that work on the implementation of such a mandate could be conducted in parallel with the topics covered by the existing mandate;

(ii) Noted the establishment of an informal group to study the feasibility of developing a convention on international insolvency law, as well as wider adoption of the Model Law on Cross-Border Insolvency (A/CN.9/798, para. 19); and

(iii) Noted the interest and the support given by some delegations and observer groups to form a study group to consider whether there were inconsistencies between the current treatment of financial contracts in the Legislative Guide and recent developments and to provide the Working Group with a report (A/CN.9/803, para. 42).

(d) *International contract law*: The Secretariat has continued to promote the adoption and monitor the uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") and has compiled citations to relevant documents in the field in the bibliography on its website. In the framework of those ongoing activities, and in line with the Commission's request to celebrate the CISG 35th anniversary in 2015, the Secretariat is planning additional activities related to the CISG and its complementary texts, i.e. the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980 (Vienna); and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005); as well as related non-UNCITRAL texts, such as the Unidroit Principles of International Commercial Contracts and regional sales law texts. The Commission will hear an oral report on

the progress in the planning of those activities, which are being undertaken to identify possible future work in this subject-area.

(e) *MSMEs*: At its forty-sixth session, in 2013, the Commission took note of five broad areas in which the participants at the 16-18 January 2013 Colloquium on the topic had recommended work should begin on addressing the legal aspects of an enabling legal environment for MSMEs. The five topics were: simplified business start-up and operation procedures, alternative or online dispute resolution, access to financial services, access to credit and insolvency. The Commission agreed that work aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle should be commenced, and that such work should start with a focus on the legal questions surrounding the simplification of incorporation (A/68/17, paras. 317 and 321).

(f) *Online Dispute Resolution*: At its forty-sixth session, the Commission reaffirmed the mandate of Working Group III to prepare a legal standard on online dispute resolution in low-value, high-volume cross-border electronic transactions.[8] The Working Group continues to prepare procedural rules for the resolution of online disputes, and may proceed to consider the possible preparation of guidelines for ODR providers and platforms (see A/CN.9/WG.III/WP.128).

(g) *Public procurement and related areas, including public-private partnerships (PPPs)*: At its forty-sixth session, in 2013, the Commission considered the report of a Colloquium on possible future work in PPPs held in May 2013, and requested further preparatory work on the topic to set a precise scope for any mandate to be given for development in a working group (A/68/17, para. 331).

Since that point, the Secretariat has engaged in studies and consultations with experts, and has held an "International Colloquium on PPPs", (Vienna, 3-4 March 2014). The report of the colloquium (A/CN.9/821), and the discussion papers (A/CN.9/819 and A/CN.9/820) upon which the colloquium based its conclusions, are before the Commission at this session. Further background materials and presentations made at the colloquium are available at the following page on the UNCITRAL website — https://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html.

The colloquium reaffirmed the potential of PPPs to make enormous contributions to sustainable economic and social development, and in particular to fill a significant infrastructure funding gap identified by many empirical studies and commentators. It considered that the resultant need was most acute in developing countries, and that PPPs with small private operators (such as MSMEs) could also support local and regional development. Experience with substandard and failing PPPs, it was recognized, underscored the need for an effective legislative model for States to use to develop best practices and standards so as to allow efficient and effective PPPs.

The scope of a future legislative text on PPPs was clarified during the colloquium, fulfilling the Commission's 2013 request noted above. The colloquium also concluded that the scope of work proposed to be undertaken was as well-defined as it reasonably could be before legislative development of a text

[8] [Ibid.], *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

commenced. Consequently, the colloquium recommended to the Commission that it provide a mandate for the development of a Model Law and accompanying Guide to Enactment on PPPs (A/CN.9/821, paras. 120-121).

The Colloquium emphasized the benefits of undertaking such a project through a working group (supported by intersessional consultations) that would enable and encourage States at all levels of development to participate, and urged the Commission, taking into account the need to prioritize thematic areas of UNCITRAL's work, to explore all possibilities to facilitate legislative development on PPPs in this manner (A/CN.9/821, paras. 127-130).

In summary, documents A/CN.9/819, A/CN.9/820 and A/CN.9/821 provide further details of the proposals in this subject-area. In the light of the recommendations of the Colloquium, it is proposed that the work envisaged on PPPs in the year to the next Commission session take place through one or more weeks of conference time, and informal working methods to include consultations through meetings, video/telephone conferences and other communications.

(h) *Security Interests*: As Table 1 indicates, it is envisaged that a draft Model Law on Secured Transactions (the "draft Model Law") will be completed and submitted by Working Group VI to the Commission for consideration and adoption in 2015. At its twenty-fifth session, the Working Group considered some definitions and three draft model provisions on security interests on non-intermediated securities and adopted a recommendation to the Commission that the draft Model Law should address security interests in non-intermediated securities (A/CN.9/802, paras. 72-93). At the present session, the Commission will have before it, in addition to the reports of the Working Group (A/CN.9/796 and A/CN.9/802), a note by the Secretariat on security interests in non-intermediated securities. The Commission may wish to consider the reports of the Working Group and that note and decide that the draft Model Law should include some definitions and draft model provisions on security interests in non-intermediated securities.

Working Group VI is expected to complete its work on the draft Model Law on Secured Transactions (including, subject to approval by the Commission, with respect to non-intermediated securities), and submit it to the Commission for consideration and approval in 2015. In considering the draft Model Law, the Working Group has referred a number of matters to a guide to enactment of the draft Model Law for clarification. This guide to enactment can include references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") which refers to the various policy approaches that the legislator may follow with their comparative advantages and disadvantages and includes legislative recommendations as conclusions. However, the guide to enactment needs to explain in a short and focused way the draft model provisions that have a different formulation, different structure, and, subject to approval by the Commission, a different scope from that of the Secured Transactions Guide. Thus, the Working Group will need two more working group sessions (fall 2015 and spring 2016) to complete this guide to enactment. The Working Group will also need to be given the mandate to make any changes to the draft Model Law that may become necessary as a result of the discussion of the guide to enactment, which will be considered by the Commission in 2016 together with the guide to enactment. As to the contractual guide on secured transactions in particular for small- and medium-size enterprises and enterprises in developing countries, and to a uniform

law text on intellectual property licensing, topics that were placed by the Commission on its future work agenda at its forty-third session (see A/65/17, paras. 264 and 273), the Commission may wish to consider them at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting.

Document A/CN.9/811 provides further details of the proposals in this subject-area.

14. The Commission may wish to assess the need for conference time for those of the above proposals it decides to take up, and to make recommendations regarding informal working methods accordingly.

B. Current and possible future activities to support the adoption and use of UNCITRAL texts

15. Details of current activities to support the adoption and use of UNCITRAL texts are found in the series of documents before it regarding activities other than legislative development (listed in para. 7 above).

16. In accordance with the deliberations of the Commission at its second, third, thirty-first, forty-first, forty-fourth and forty-fifth sessions where it promoted the dissemination of information and the harmonization of the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention", A/CN.9/814, para. 1) as well as the preparation of a guide on that convention, the Secretariat is preparing a guide on the New York Convention, in close cooperation with experts. Chapters of the guide are contained in documents A/CN.9/786, A/CN.9/814 and its addenda.

17. The Secretariat plans to prepare and distribute an accession toolkit in respect of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"). It is anticipated that this text will assist States intending to ratify the Rotterdam Rules and that it will be finalized for the Commission to note at its 48th session in 2015.

IV. Allocation of resources and prioritization

A. Extent of future legislative development and need for prioritization, or alteration in working methods

18. At its forty-sixth session, the Commission underscored the importance of a strategic approach to resource allocation, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, para. 294). The Commission therefore set out certain strategic considerations, including as regards prioritization among subject-areas and activities, and resource considerations (A/68/17, para. 295).

19. As regards the allocation of resources for legislative development, the Commission has regularly emphasized the benefit of UNCITRAL's primary working method — that is, legislative development through formal negotiations in a working

group. A key element of the process is that the resultant text is recommended to the Commission for consideration and adoption. This approach will be referred to as "formal working methods". The alternative approach, legislative development through (for example) Secretariat studies, assistance of outside experts and colloquia, will be referred to as "informal working methods". Document A/CN.9/752 noted the exceptional situations in which legislative texts had been developed through informal working methods (para. 33).

20. Formal working methods, as a general rule, involve the allocation of a single subject-area to a working group for the development of a legislative text, and the allocation of two weeks' conference time per year for that purpose. The Commission acknowledged that this allocation could also be undertaken flexibly, rather than through an automatic allocation of two weeks per subject per year (A/68/17, para. 298).

21. The preceding sections of this Note indicate that there are at least eight subject-areas in which legislative activity is ongoing and/or for which it is proposed. Undertaking legislative development using two weeks of conference time per subject, therefore, would require considerably more than the twelve weeks normally allocated to working group sessions.

22. The Commission is therefore invited to address the allocation of resources to future work in the light of the lack of capacity to undertake all proposed legislative development using formal working methods. The Commission may wish to assess the extent of future legislative development (that is, whether all subject-areas should be subject to further legislative development), the recommendations for allocation of conference time and that work can be undertaken using informal working methods together.

23. The Commission may also wish to take into account its review on the use of formal working methods at its forty-sixth session, set out in paragraphs 300 and 303-306 of A/68/17, itself based on the detailed discussion in Section IV of document A/CN.9/774. The main conclusions reached at that session are summarized below, for ease of reference.

24. First, the Commission set out four tests that it would bear in mind in deciding whether to take up a topic and remit legislative development in the subject-area to a working group:

(a) Is it clear that a topic is likely to be amenable to harmonization and the consensual development of a legislative text?

(b) Are the scope of a future text and the policy issues for deliberation sufficiently clear?

(c) Is there a sufficient likelihood that a legislative text on the topic would enhance the law of international trade?

(d) Legislative development should not be undertaken if so doing would duplicate work on topics being undertaken by other law reform bodies, and preparatory work to identify any areas of potential duplication should be undertaken before a topic is referred to a working group (A/68/17, paras. 303-304).

25. Secondly, the Commission emphasized that the mandate for a working group should be precise, should reflect the maturity of the subject-matter and should

clearly identify the scope of work to be undertaken, including the envisaged nature of the legislative text where appropriate (A/68/17, para. 302).

26. In the light of the lack of conference time noted above, the Commission may wish to assess the requirements recalled in the preceding two paragraphs not only as an initial consideration when deciding whether to refer a topic to a working group, but also on a continuing basis. So doing would be one way to assess whether legislative development through formal working methods only or as the main approach remains appropriate, or whether more use of informal working methods would be a suitable alternative. The following paragraphs will refer to the requirements set out in the preceding two paragraphs as "formal resource allocation requirements".

27. The Commission might also wish to request working groups regularly to consider formal resource allocation requirements as an item on their agenda, and report accordingly to the Commission. Regular reports from working groups, colloquia and other documents that are before the Commission in their current format could also assist it in assessing formal resource allocation requirements.

28. After assessing formal resource allocation requirements, the Commission may find that the available conference time is insufficient for all desired legislative development through formal working methods, given the current practice in the allocation of conference time among working groups.

29. If so, the Commission may wish to consider the following options, among others:

(a) The creation of an additional working group;

(b) Adapting the current approach of allocating a single subject-area to a working group, perhaps in combination with taking a more flexible approach to the allocation of conference time among working groups (i.e., revising the general automatic allocation of two weeks per subject per working group and per year);

(c) Undertaking some legislative development in one or more subject-areas through greater use of informal working methods; and/or

(d) The exclusion of a subject-area from legislative activity, at least on a temporary basis, based on the relative priority of subject-areas.

30. It will be evident that these options are not mutually exclusive, and that a combination of approaches may be appropriate for different subject-areas. The following subsections set out some considerations relevant to each option, which the Commission may wish to take into account during its deliberations.

(a) The creation of an additional working group

31. The Commission may wish to recommend to the General Assembly that a seventh working group be created, so as to allow for more legislative development than is currently possible. If it considers this step appropriate, it may wish to make recommendations (a) regarding the use of up to sixteen weeks of conference time that is available per annum for the meetings of UNCITRAL and its working groups; and (b) regarding additional resources that would be required to allow the Secretariat to service an additional working group. It may also wish to make

contingency plans should the General Assembly not provide the resources identified as necessary for the fulfilment of any new mandates provided by the Commission.

(b) A more flexible approach to the allocation of conference time

32. The Commission may consider that more than one subject-area could be allocated to a working group in each year. In this regard, the Commission may wish to recall its discussion at its forty-sixth session (A/68/17, para. 298). As reported in document A/CN.9/752, paras. 23 and 34, servicing six working groups stretches the resources of the Secretariat to the extent that quality may be negatively affected; the Commission may consider that allocating more than one topic to each working group, or other methods designed to achieve greater flexibility, should be undertaken with care to avoid greater risks to quality.

(c) More flexible approach to combining formal and informal working methods

33. This approach was considered in general terms at the forty-sixth session (A/68/17, paras. 295 and 300-301), drawing on the information contained in both A/CN.9/752 (para. 34) and A/CN.9/774 (paras. 38-42). The Commission recalled that the Commission stated even at its first session that the balance between informal and formal negotiations should be assessed in the light of the nature of the topic concerned (A/72/16, para. 43, as reported in A/CN.9/774, para. 36; see also A/CN.9/752, paras. 35 and 37-40).

34. The Commission will be aware that legislative development routinely combines formal and informal working methods, as the Secretariat prepares for each working group session and consults with experts for that purpose. Nonetheless, the Commission at its last session reaffirmed that the primary method for the development of UNCITRAL texts should remain the formal one, as the transparency, multilingualism and inclusiveness that the formal negotiation process involves supports the universal applicability and acceptance of those texts (A/68/17, para. 300, noting the issues set out in A/CN.9/774, paras. 15-17).

35. In addition, the Commission suggested that there should be a limit to the length of time that a working group should remain seized of a subject-area. While recognizing the importance of creating and retaining expertise within working groups, to ensure the quality and sustained relevance of UNCITRAL texts, and the time involved, it cautioned against the creation of de facto semi-permanent or permanent working groups whose remit and mandate is not reviewed regularly. Otherwise, the Commission noted, topics it might consider to be high priorities for UNCITRAL to work upon might be crowded out (A/68/17, para. 299).

Review of mandate of working group

36. There are several situations that provide opportunities to review the remit and mandate of a working group for a particular subject area, and therefore stages in the legislative development process (in its broadest sense) when it may be appropriate to move further development between formal and informal working methods.

37. The most obvious such stage arises when a legislative text is adopted. At this stage, the Commission frequently considers recommendations for future work in that subject-area from the working group concerned. The Commission may consider that the resource allocation requirements should be considered afresh before a

working group is mandated to start work on another legislative text in a particular subject-area. The result of such an assessment may be that preparatory work is considered necessary before the topic concerned is ready for submission to a working group. (For the possible benefits of a short break in legislative development in a subject-area in terms of supporting the promotion and adoption of UNCITRAL texts, see paras. 40-45 below.)

38. There are other stages when a change in working methods may be appropriate, as the Commission has recognized, when a working group is mandated to develop a text. They include the point at which provisions on highly technical aspects of topics are to be drafted, and drafting a text that is nearing completion, including through the use of drafting groups. (A/CN.9/774, para. 43, and A/68/17, para. 301). A further situation may arise where there is a need to research and consult widely on possible solutions to issues arising during legislative development upon which consensus cannot be found in a working group, and/or that may indicate that the four tests set out in paragraph 24 above and requirement for a precise mandate recalled in paragraph 25 above are no longer satisfied.

39. Whether the Commission requests preparatory work before a working group takes up a topic, or requests further informal consultations before a working group continues working on a legislative text already under development, it may therefore recommend a pause in the use of conference time for legislative development in a particular subject-area.

Benefits of combining formal and informal working methods

40. Allowing for breaks in the use of conference time for the development of a text, while informal consultations or other preparatory work are undertaken, may enhance the efficacy of the use of conference time overall, eventually allowing for legislative development in more subject-areas than might otherwise be the case. Such an approach could also reduce the risk of creating working groups that are tied to a particular subject-area on a semi-permanent or permanent basis.

41. The Commission may, however, consider that such breaks would be potentially disruptive and so should be provided for as the exception, rather than the rule. However, it may believe that the flexibility to allow for them should not be excluded.

42. The Commission may acknowledge that this approach requires a detailed review of progress of working groups, and may involve the Commission in taking views on relative priorities that are not always in accordance with those of its working groups. However, the assessment of current and future legislative development together in the ways described above may allow the Commission to apply its strategic considerations more consistently.

43. It may also be noted that considering the balance of work through formal and informal methods can enable the Commission to consider the priority to be ascribed to a future text both in terms of its importance and the appropriate time frame (as further discussed in para. 32 of document A/CN.9/774).

Possible advantages of a more regular turnover in working groups

44. The Commission may wish to consider whether the current situation over-emphasizes the link between a subject-area and a particular working group, with the result that the members of working groups are reluctant to agree to a break in legislative development through formal working methods in the subject-area concerned because of the risk that further conference time will not become available in the short- to medium-term. Providing for a more regular and predictable turnover of working groups and subject-areas could also encourage a more flexible and responsive approach to the allocation of conference time as a whole.

45. If breaks in legislative development are used to engage in consultations and other preparatory work, and are recognized as a normal part of legislative development in UNCITRAL, the valuable expertise built up in a working group could still be retained. Accordingly, if and when a topic is resubmitted to a working group, legislative development can then continue with as little disruption as possible. The Commission may consider that such an approach can assist in balancing the need for continuing expertise and its wish to avoid creating permanent or semi-permanent working groups.

Advantages and possible concerns in greater use of informal working methods

46. The Commission has agreed that the Secretariat should continue to exercise flexibility in organizing informal work to suit the needs of each relevant subject-area, but has stressed that there should be limits to such informal working methods. In particular, the Commission has emphasized and that all legislative texts should be considered by the Commission prior to adoption (A/68/17, para. 301).

47. The Commission has also expressed concerns about some aspects of informal working methods, including that there may be less than full transparency, decreased multilingualism and inclusiveness, and possible dominance by specialized groups and interests (A/68/17, para. 301).

48. On the other hand, the Commission may recall certain benefits of informal working methods. They include that consultations prior to and between working group sessions can help to ensure that a legislative text is finalized as early as possible (and as noted above, potentially thereby allowing for legislative development in more subject-areas than might otherwise be the case). Allowing issues to be widely discussed during the development process, including with the support of regional organizations including the multilateral development banks where possible, may facilitate the inclusion of experience from all regions and reduce the impact of some of the other concerns about informal working methods noted above.

49. In this regard, the Commission may consider that the use of colloquia serves as a hybrid between formal and informal working methods, in that their documents are available on the UNCITRAL website, and that there is flexibility in organizing them on a multilingual basis. To this extent, colloquia may help to reduce the impact of the above concerns. However, the Commission may also recognize that full transparency, multilingualism and inclusiveness will be achieved where the colloquia are undertaken using conference time (which includes translation resources): that is, taking time that would otherwise be allocated to a working group or to the Commission itself.

50. In addition, the Commission may consider that ensuring that legislative texts are developed using formal as well as informal working methods (through continuing to review texts prior to adoption, whether or not they have previously been drafted by a working group) can also reduce the impact of these concerns.

Resource implications of greater use of informal working methods

51. Seeking to increase UNCITRAL's overall capacity to develop legislative texts through greater use of informal working methods effectively increases the requirement for resources within the Secretariat. Additional resources would be required not only for the informal working methods themselves, but also for a greater level of planning and coordination, and the publication of more information on the UNCITRAL website than is practicable using current resources.

52. Paragraphs 45-47 of document A/CN.9/774 noted existing constraints in the timely availability of official documents in all United Nations official languages; it is unlikely that documents to support informal working methods could be issued other than in English unless additional external resources are available (see, further, Section IV of A/CN.9/816). The Commission has also been invited to consider rationalizing the volume and contents of documents (A/CN.9/774, paras. 34 and 36), at the more general level.

53. Assuming that UNCITRAL's resources remain at their current level, a further consequence of greater use of informal working methods would be that other activities of the Secretariat would need to be reduced commensurately. (These activities are described in the documents referred to in para. 7 above, and future work in this regard is considered in the next Section of this Note.) The activities themselves — as noted in paragraph 38 of document A/CN.9/774 and paragraphs 35 and 37-40 of A/CN.9/752 — can also enhance the efficiency of the legislative development process, for example in enabling better background information on legislative needs to be identified before proposals for legislative development are formulated.

54. Furthermore, UNCITRAL's budget is structured around its human resources, with limited additional financial resources. It is largely such additional financial resources that would be needed to increase the use of informal working methods (to allow for bringing experts to Vienna for informal consultations, travel to regional consultations, and hiring consultants where necessary; and improved information dissemination). Unfortunately, these very resources are a main focus of cuts to the United Nations budget. The Commission may therefore wish to bear in mind that the Secretariat will not able to engage in unlimited additional legislative development through informal working methods. (For discussions of activities seeking extrabudgetary resources, see Section IV of document A/CN.9/816).

(d) Exclusion of some subject-areas from legislative development in UNCITRAL

55. The Commission may wish to take into account certain factors that it has previously noted might guide prioritization among subject-areas where all cannot be accommodated within UNCITRAL. Some such factors are set out in paragraphs 20-29 of document A/CN.9/774 (citing earlier UNCITRAL reports), and can be summarized as follows:

(a) Success in harmonization of international trade law may be more easily achieved in technical areas rather than those closely connected with fundamental legal traditions and basic principles of domestic law;

(b) There should be an economic need for harmonization and evidence of a probable beneficial effect on international trade;

(c) That texts of the UNCITRAL type may have a radiation effect, encouraging their application beyond adoption per se;

(d) The importance of considering the role and relevance of UNCITRAL activities within the broader United Nations agenda and the priorities of donor communities and national Governments should not lead to a blanket adoption of other agencies' priorities (A/68/17, para. 306).

56. Applying these considerations, and where topics suitable for legislative development exceed the available resources, the Commission may wish to assess whether legislative development in some subject-areas would be more likely to be successful in enhancing the law of international trade in the broad sense, and would better reflect the priorities of the United Nations, members of donor communities and national Governments, than such development in other subject-areas.